

No. 91-822

Supreme Court U.S.
FILED

DEC 17 1991

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In The

Supreme Court of the United States

October Term, 1991

SHARON J. KRANK,

Petitioner,

vs.

FULTON BANK,

Respondent.

*On Petition for a Writ of Certiorari to the United States Court
of Appeals for the Third Circuit*

RESPONDENT'S BRIEF IN OPPOSITION

WILLIAM M. YOUNG, JR.

Counsel of Record

DAVID E. LEHMAN

McNEES, WALLACE & NURICK

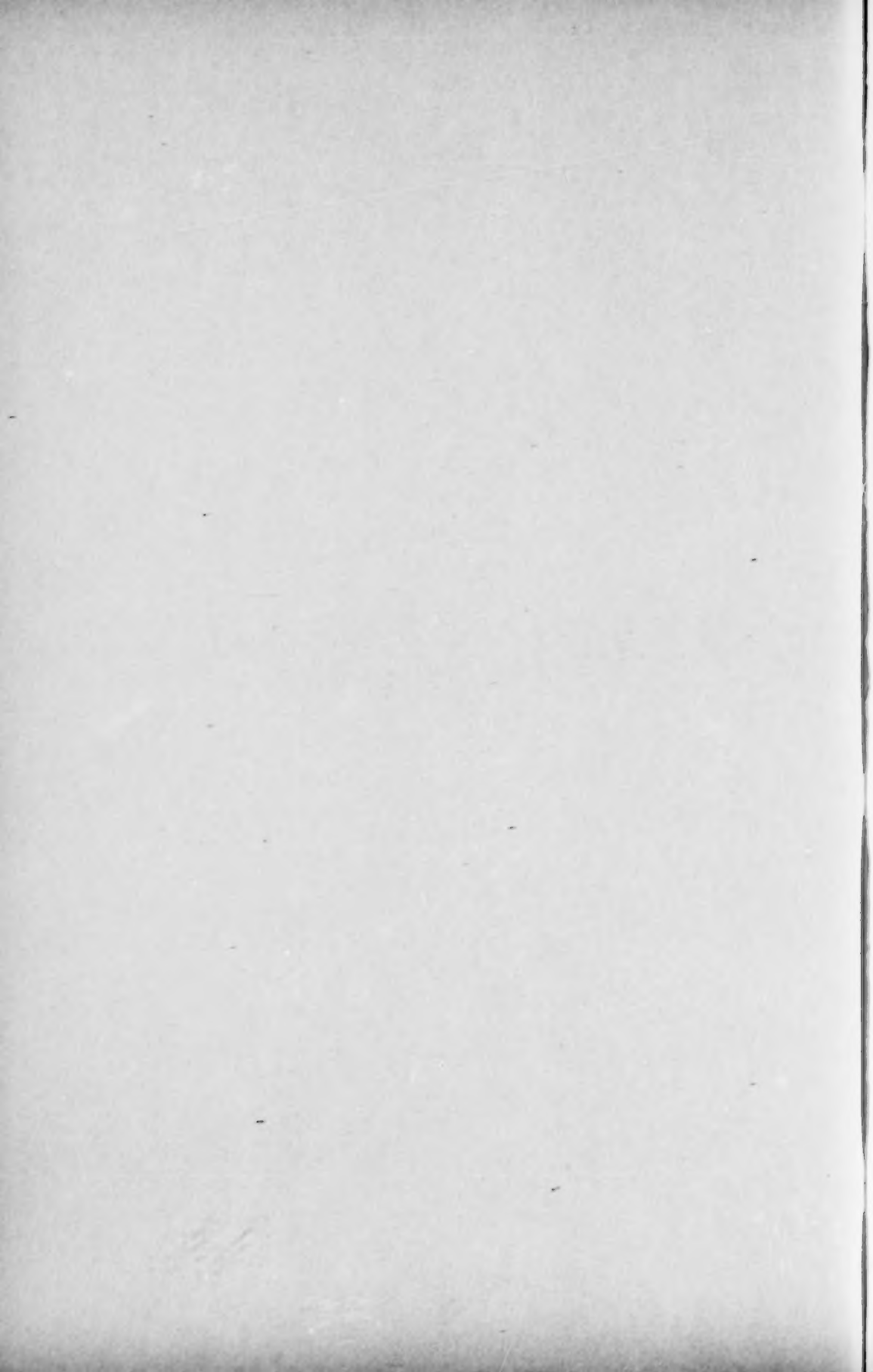
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QUESTION PRESENTED

Was the alleged failure of the trial court to properly instruct the jury waived by petitioner's failure to submit a point for charge or to take exception or request a supplemental charge at trial?

TABLE OF CONTENTS

	<i>Page</i>
Question Presented	i
Table of Contents	ii
Table of Citations	ii
Counterstatement of Jurisdiction	1
Counterstatement of the Case	2
Summary of Argument	5
Reasons for Denying the Writ	5
Conclusion	7

TABLE OF CITATIONS

Cases Cited:

Callwood v. Callwood, 233 F.2d 784 (3d Cir. 1956)	6
Fisher v. Volz, 496 F.2d 333 (3d Cir. 1974)	6
Scott v. Plante, 641 F.2d 117 (3d Cir. 1981).....	6

Rule Cited:

Federal Rule of Civil Procedure 51	5
------------------------------------------	---

Contents

Page

Other Authorities Cited:

5A J. Moore, Moore's Federal Practice, ¶ 51.04	6
6A J. Moore, Moore's Federal Practice, ¶ 59.08(2) (2d Ed. 1989)	6

APPENDIX

Appendix A — Order of the United States District Court for the Eastern District of Pennsylvania Filed January 16, 1990	1a
Appendix B — Judgment Order of the United States Court of Appeals for the Third Circuit Dated September 25, 1990	3a
Appendix C — Order Sur Petition for Panel Rehearing Dated May 14, 1991	5a

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RESPONDENT'S BRIEF IN OPPOSITION

COUNTERSTATEMENT OF JURISDICTION

The following orders were entered by the courts below:

Order of the United States District Court for the Eastern
District of Pennsylvania, January 16, 1990 (Appendix A, 1a).

Judgment Order of the United States Court of Appeals for the Third Circuit, September 25, 1990 (Appendix B, 3a).

Order Sur Petition for Panel Rehearing, May 14, 1991 (Appendix C, 5a).

COUNTERSTATEMENT OF THE CASE

During a period of more than six years preceding August of 1983, Edythe C. Herr, entered into commercial borrowings from Fulton Bank to finance acquisition and development of various parcels of real estate. These activities included a residential development tract, an office building and a residence. In June 1977, Ms. Herr executed a mortgage note and mortgage in favor of Fulton Bank, which instruments provided, among other things, security for present and future debts of Herr. The mortgage secured both her office building and her residence properties.

Pursuant to an overall lending and security plan, the Bank made five loans to Ms. Herr between 1978 and 1981, in amounts of approximately \$547,000. Numerous notes and collateral security documents were provided to Fulton Bank in connection with those loan transactions.

By 1981, Ms. Herr was delinquent in her borrowings from Fulton Bank. In November 1981, she communicated with the Bank concerning a proposed sale of her office building to Donald Krank¹ and/or Sharon Krank.

1. Donald Krank, formerly a practicing attorney, was one of the plaintiffs in the District Court proceeding and served as counsel for himself and his wife at trial. His claim was dismissed upon motion for directed verdict. He did not appeal and has no record role in connection with either the Third Circuit proceedings or the current petition for certiorari.

The Bank advised Ms. Herr in writing on November 23, 1981 that Fulton Bank would agree, upon receipt of payment of the proceeds from sale of the office building to "execute a Release of Mortgage on the office leaving the mortgage to cover your personal residence only."

In September 1983, there were communications between Herr and representatives of the Bank concerning the payoff balance related to the mortgage note of June 24, 1977. Certain checks were delivered by Herr to the Bank in connection with the payoff of that particular loan. There was disputed testimony at trial concerning discussions about preparation and delivery of forms for the Bank to release the subject property from the mortgage lien. The Bank's witnesses testified that Ms. Herr offered to bring releases into the Bank, that the practice in Lancaster County was for the release of a property from lien of mortgage to be prepared by the settlement agent or obligor (Donald Krank and/or Edythe Herr). Releases were provided to the Bank, were executed by the Bank on October 3, 1983 and delivered back to and received by Ms. Herr.

The dispute in this case concerned whether or not the Bank had promised to *satisfy* the accompanying mortgage, rather than merely release the property from the lien of mortgage. The Bank maintained that it desired to keep the mortgage in place and in effect to provide whatever security it might with respect to other property owned by Edythe Herr and other obligations of Herr's which remain unpaid. As of September 1983, after taking into account the payment which was made, there were still delinquent balances due from Ms. Herr's company, for which she was a personal guarantor, totalling \$432,280.

The underlying theory of claim against the Bank and the basis of the Bank's alleged liability was not clearly articulated by Kranks. Although the testimony was confusing, it appeared that the basis

of the claims by both Mr. and Mrs. Krank were that the Bank had promised to satisfy (or in the alternative to take steps affirmatively to release the lien of) the mortgage in question.

Trial Judge Edward N. Cahn determined that the only theory presented for decision by the jury was a contract theory, whether the arrangement between Krank/Herr and Fulton Bank was a contract to satisfy or to release the mortgage in question, and, if so, whether the Bank breached that contract. Accordingly, the trial judge submitted interrogatories to the jury as follows:

1. Has the Plaintiff, Sharon J. Krank, proved by a preponderance of the evidence that the Defendants, Fulton Bank wrongfully refused to satisfy the \$140,000 mortgage on the premises at 1574 Lititz Pike?

2. Has the Plaintiff, Sharon J. Krank, proved by a preponderance of the evidence that the Defendants, Fulton Bank, wrongfully refused to release the lien of Mortgage on the premises at 1574 Lititz Pike?

The trial court carefully instructed the jury on the contractual theory of the case and the relationship of that theory to the testimony it had heard. The parties were given opportunity to comment on the proposed interrogatories and on the instructions, before the jury was sent to deliberate. At no time did appellants object to the submission of the case on the contract theory or to the interrogatories to be submitted for jury decision. The jury's answers to both interrogatories 1 and 2 was "No."

The term "dragnet clause" was used a number of times during testimony and was the subject of some comment in the course of argument by both parties. The trial judge correctly pointed

out to the jury, however, that determination of the contract questions presented to them did not involve an application of the dragnet clause.

SUMMARY OF ARGUMENT

No basis exists for this Court to grant petitioner's petition for a writ of certiorari. Petitioner has failed to identify a single error of law in the decision of the court below. To the contrary, it was petitioner's failure to raise objection at trial which acts as a waiver and precludes any further review of the propriety of jury instructions.

REASONS FOR DENYING THE WRIT

The Kranks' claim was well and fairly tried on the basis upon which it was submitted. A simple contract question on which there was disputed testimony was framed for the jury's determination.

Petitioner has identified no error of law in the instructions which were given by the court. On the contrary, the excerpts furnished from the court's charge are straightforward, innocuous statements of law and general instruction. The only issue framed in the case and argued to either this Court or to the court below is the argued failure of the trial court to give proper instructions to the jury. However, the matter now assigned as trial error was not the subject of any point for charge, nor of any request for supplemental instruction. No objection was made by petitioner at the conclusion of the instructions, before the jury retired to consider its verdict. Such failures are well-recognized to constitute a waiver of the right to challenge and raise the matter on appeal. Federal Rule of Civil Procedure 51 is clear:

No party may assign as error the giving or the failure to give an instruction unless that party

objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury.

To the same effect, the cases in the Third Circuit hold that failure to raise an objection relating to trial instructions constitutes a waiver. See *Fisher v. Volz*, 496 F.2d 333, 348 (3d Cir. 1974); *Scott v. Plante*, 641 F.2d 117, 128 (3d Cir. 1981).

Finally, respondent suggests that this is not an extreme situation of fundamental or highly prejudicial error where a "gross miscarriage of justice" might obtain through the application of the doctrine of waiver recited above. See *Callwood v. Callwood*, 233 F.2d 784, 788 (3d Cir. 1956), 6a J. Moore, *Moore's Federal Practice*, ¶ 59.08[2] at 59-88-89 (2d Ed. 1989); 5A J. Moore, *Moore's Federal Practice*, ¶ 51.04 at 51-14-20.

All of these points were considered by the court below. No basis exists on which this Court should review the disposition made by the Court of Appeals for the Third Circuit.

CONCLUSION

For the foregoing reasons, respondent Fulton Bank respectfully requests this Court to deny the petition for a writ of certiorari.

Respectfully submitted,

WILLIAM M. YOUNG, JR.

Counsel of Record

DAVID E. LEHMAN

McNEES, WALLACE & NURICK

Attorneys for Respondent

Dated: December 13, 1991



**APPENDIX A — ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE EASTERN DISTRICT OF
PENNSYLVANIA FILED JANUARY 16, 1990**

CIVIL ACTION NO. 89-2871

SHARON J. KRANK and DONALD KRANK

Plaintiffs

v.

FULTON BANK,

Defendant

ORDER

AND NOW, this 11th day of January, 1990, IT IS
ORDERED as follows:

1. The motion of Fulton Bank pursuant to Federal Rule of Civil Procedure 50(a) for a directed verdict against Donald Krank is GRANTED.
2. Judgment is hereby ENTERED in favor of defendant, Fulton Bank, and against plaintiff, Donald Krank.
3. In accordance with the answers of the jury to the interrogatories propounded to them, judgment is ENTERED in favor of defendant, Fulton Bank, and against plaintiff, Sharon J. Krank.
4. The Clerk is directed to close the docket of the within case for statistical purposes.

Appendix A

BY THE COURT:

s/ Edward N. Cahn
Edward N. Cahn, J.

**APPENDIX B — JUDGMENT ORDER OF THE UNITED
STATES COURT OF APPEALS FOR THE THIRD CIRCUIT
DATED SEPTEMBER 25, 1990**

No. 90-1163

KRANK, SHARON, J.,
KRANK, DONALD F.,

Appellants

v.

BARBER, JOHN T. ESQ.,
BARLEY, SNYDER, COOPER & BARBER,
FULTON BANK

Appeal from the United States District Court for the Eastern
District of Pennsylvania
(D.C. Civil Action No. 89-02871)
District Judge: Hon. Edward N. Cahn

Submitted Under Third Circuit Rule 12(6)
July 24, 1990

Before: HIGGINBOTHAM, *Chief Judge*, MANSMANN and
COWEN, *Circuit Judges*.

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the
district court be and is hereby **AFFIRMED**.

Appendix B

Costs taxed against appellant.

BY THE COURT,

s/ A. Leon Higginbotham
Chief Judge

Attest:

s/ Sally Mrvos
Sally Mrvos, Clerk

**APPENDIX C — ORDER SUR PETITION FOR PANEL
REHEARING DATED MAY 14, 1991**

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

No. 90-1163

**KRANK, SHARON, J.,
KRANK, DONALD F.,**

Appellants

v.

**BARBER, JOHN T. ESQ.
BARLEY, SNYDER, COOPER & BARBER,
FULTON BANK**

(D.C. Civil Action No. 89-02871)

ORDER SUR PETITION FOR PANEL REHEARING

**Present: MANSMANN, COWEN and HIGGINBOTHAM,
*Circuit Judges.***

The petition for rehearing filed by Sharon Krank, in the above-entitled case having been submitted to the judges who participated in the decision of this Court, and no judge who concurred in the decision having asked for rehearing, and none of the members of the panel having voted for rehearing, the petition for rehearing is denied.

* Honorable A. Leon Higginbotham, Jr., was Chief Judge at the time the original judgment order was filed on October 17, 1990, having assumed Senior Judge status on February 1, 1991.

6a

Appendix C

BY THE COURT,

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s/ A. Leon Higginbotham
Circuit Judge

